

## Robert T. Hall

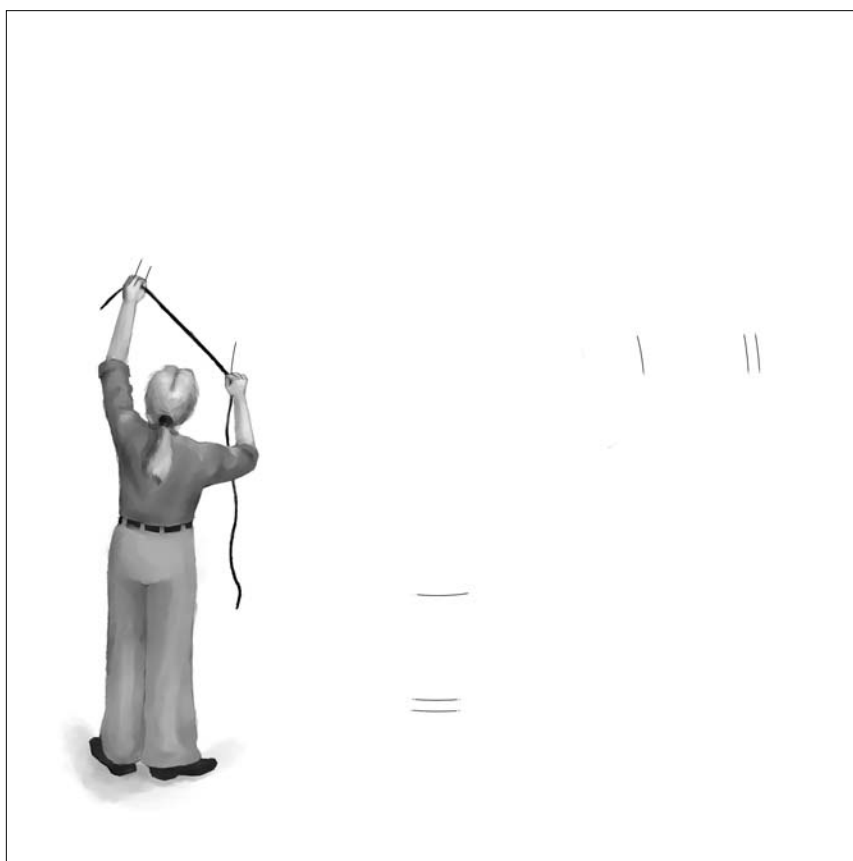
VTLA President 1986-1987



# Janus in the Doorway

## 40 Years of Legal Beginnings, Endings and Beginnings

by Robert T. Hall



I've been invited to reflect upon the past 40 years of Virginia practice. This is not a nostalgia piece. I mourn the passing of friends, adversaries and colleagues whose camaraderie enriched the practice of law these past 40 years, but I don't miss the era. First, a familiar disclaimer. I don't speak for the Virginia Trial Lawyers Association. The opinions herein are my own. Some readers may find them disagreeable. I hope so. A good controversy can produce a new consensus.

Forty years ago the Virginia legal system was in disarray. While it has matured, somewhat, and we have become a more just, fair and compassionate society, there have been hiccups and glitches and significant problems remain. At present the nation seems to be regressing. Justice always is a work in progress.

In the 1960s General District Court judges were usually extensions of the Commonwealth's Attorneys office, selected not for their judicial skills and qualities, but their political loyalties. The presumption of innocence was mouthed but ignored. Police, of course, always told the whole truth and nothing but the truth.

The community was caught up in "reefer madness." The Commonwealth wouldn't waive a jury in a drug case, no matter how small, counting on a jury's sense of outrage to select a harsh sentence. As long as it fell within the statute, there was no such thing as an excessive punishment for possession of small quantity of marijuana. Juries were also permitted to infer an intent to distribute from the quantity possessed, [that might mean two baggies], and that crime bore heavy penitentiary time. Likewise, if an 18-year-old sold a "dime bag" to a 17-year-old classmate, he was guilty of selling drugs to a minor and was looking at a 10-year sentence.

Virginia was still wrestling with *Brown v. Board of Education* and the residue of many decades of racial discrimination. To avoid compliance with *Brown*, an elaborately bogus scheme of private

schools had been created, and after that system collapsed the public schools system remained *de facto* segregated.

Racial prejudices had been memorialized in Virginia law. The Racial Integrity Act of 1924, which required that a racial description of every person be recorded at birth, and made marriage between “white persons” and non-white persons a felony, was declared constitutional by the Supreme Court of Virginia in 1966, the year I entered private practice, in an opinion authored by the then Chief Justice.<sup>1</sup> He found support in *Plessy v. Ferguson* and distinguished *Brown v. Board of Education*. The Act, he ruled, suffered no equal protection defects.

The trial judge had seen it this way:

Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Jury sentencing invariably produced longer penitentiary time for convicted blacks than convicted whites and significantly longer incarcerations if the accused was black and the victim white. The ratios of whites to blacks on Virginia jury rolls was disproportionate to their census figures. Peremptory challenges frequently produced all white juries - by design.

Voter lists were controlled through the poll tax and legislative districts were gerrymandered to produce a nearly all white General Assembly - again, by design.

“Equal Justice Under Law” remained applicable only to whites.

Mercifully, much has changed.

Virginia attorneys Phil Hirschkop and Bernie Cohen, both former partners of mine and both recently retired, represented the Lovings in the U.S. Supreme Court. The Virginia Miscegenation Statute was declared unconstitutional in *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967).

The schools have since become imperfectly integrated, racial tensions now augmented by ethnic discord.

The poll tax has been repealed and the Civil Rights Acts of the 1960s have leveled the playing field in voters’ rights, public accommodations, education, and, to some degree, access to justice.

Property tax lists no longer serve as the sole source for identifying prospective jurors and inclusion of licensed drivers, voters and other broad-based criteria have made the jury rolls far more inclusive. Nevertheless, it took *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) to restrict the exclusion of minority members through the use of peremptory

challenges. Assertion of a race or gender neutral reason for the strike can still produce a racially [or gender] pure jury.

Gone are the days in which a Fairfax General District Court judge would enter a guilty plea for any defendant who didn’t speak English, to a time where there are interpreters available for most major languages. General District Court judges are, for the most part, selected for their judicial qualities rather than their political connections.

With the bifurcation of guilt and punishment phases, jury trials in criminal cases are no longer a hammer for prosecutors to “persuade” youthful first time offenders to enter pleas of guilty rather than face a long term of imprisonment, imposed by a jury ignorant of mitigating circumstances or an otherwise exemplary life. Nor are unitary trials of guilt and punishment anymore a place for defendants to hide their prior records behind sound evidentiary rules. Our renewed confidence in the ability of a well informed criminal jury to reach a fitting result has enhanced our judicial system.

Work remains to be done on the civil side. According to post-trial interviews, the presence or absence of insurance, a subject long taboo in civil trials, is the chief source of speculation and misunderstanding by our juries. Instructed not to go outside the evidence, but exhorted by counsel to apply their common sense, juries may instinctively reduce the plaintiff’s award by presumed collateral sources, unaware that by law or contract the collateral sources must be repaid.

We have come from a time when there were no women judges and few women lawyers to a time when our community is rich in each, a time when their intellect has broadened perspectives and changed mindsets. Along the way they endured “honey” and “sweetie” and “dearie” when they first appeared before an all male bench. We have advanced to the golden days of Justices Lacey, Keenan and Kinser, Chief Judge Fitzpatrick and Judge Annunziata, Attorney General Terry and women trial judges too numerous to list, who have brought enlightenment and freshness to the task of “doing justice.”

We have come from a time when there was insufficient appellate capacity to the addition of our present Court of Appeals. I remember thinking at the time that court was created how the legislature had done it “The Virginia Way.” Appeals involving property rights [alimony, equitable distribution] were to be heard as a matter of right. Cases involving liberty were to be heard by *certiorari*. Cases involving the death penalty were not to be heard by that court at all.

Substance has triumphed, in part, over form. No longer is there the magic, absolute 21 days after which a criminal judgment becomes so final that no new evidence of actual innocence could be considered. Gone is the troubling and now discredited

Virginia doctrine that “after conviction, innocence is irrelevant.”

We have been awakened to the deficiencies in our criminal justice system by the exoneration of over 205 innocents nationally because of DNA. How many innocents have we wrongly executed over the years?

Virginia voters rejected one candidate’s contention that representing people on death row disqualified his opponent from being elected Governor of Virginia. Discredited also, I hope, has been the position, articulated by one op-ed writer in the *Richmond Times Dispatch*, that the death penalty is so important to the administration of justice that it is acceptable to execute a few innocents in order to ensure the execution of all of the guilty.

Not only do we now provide trained counsel to persons charged with capital crimes, the standard for ineffective assistance of counsel has progressed from one which required that the petitioner prove trial counsel so deficient as to make a farce and mockery of the trial, to one conforming to the civil standard, reasonableness under the circumstances and adherence to the standard of care. Petitioner still retains the heavy burden of proving that his counsel’s ineffectiveness prejudiced him in a cognizable way. See *Washington v. Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

We have identified problem areas which have contributed to wrongful convictions: white victims and minority accused, convictions based on poorly corroborated confessions obtained from mentally challenged individuals, eye-witness identification enhanced by suggestive police work or observer bias, and one of my personal pet peeves, reliance on jail house snitch testimony.

In a civil case, if any of us “purchased” factual testimony [“Doctor, there’s an extra \$10,000 for you if you testify that you saw your colleague’s scalpel slip.] we would be sanctioned. If we added, “Doctor, go talk to the defendant doctor to see if you can get him to admit he was negligent. Don’t let his lawyer know you’re doing it” we’d be disbarred. In a criminal case, however, it is a regular practice for the Commonwealth to send one inmate to talk to the defendant and then offer to reduce the sentence or *nolle prosequere* his charges if he agrees to testify that the defendant made incriminating statements. The consideration, early release or dismissal of the charges, is only paid after the required testimony is given, and in one case was only to be paid if the defendant was convicted. Writers who complain that highly compensated expert witnesses might articulate junk science in the courtroom seem little disturbed by purchased fact testimony which could result in the execution of an innocent man or woman.

There are further advances awaiting action.

Videotaping or otherwise recording interrogations of the accused, and not just the final inculpa-

tory minutes, would allow the fact finder to assess the reliability of a confession. Only three states have mandated that practice, and Virginia is not among them.

Allowing expert testimony on the reliability of eye witness identification during the defense of a case predicated on such identification should be allowed under appropriate circumstances. Judges should be granted the discretion to allow it on a case by case basis.

If jailhouse snitch testimony is to be allowed at all, it should be subject to the fullest pretrial disclosure, pre-trial depositions and the strongest imaginable instruction on its inherent unreliability.

In the recent past, we have changed our death penalty jurisprudence to prevent the execution of the mentally retarded. The Virginia case of Earl Washington has reminded us of the wisdom of such a rule. As Justice Stevens remarked in *Atkins v. Virginia*, 536 U.S. 304, 320 (2002), the mentally retarded are at greater risk of falsely confessing to crimes they didn’t commit, citing Earl Washington’s case.

Similarly, we have, as a nation, concluded it is constitutionally inappropriate to execute someone who was a minor at the time of the crime. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

Virginia and the nation’s affection for the death penalty can produce bizarre judicial holdings.

In Texas, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit reversed a District Court’s grant of habeas corpus relief where a criminal defendant’s attorney repeatedly slept during portions of the criminal trial. The Petitioner, a majority of the panel concluded, failed to demonstrate that his counsel slept through important parts. *Burdine v. Johnson*, 231 F.3d 950, 964 (5th Cir. 2000). Mercifully a divided court, sitting *en banc*, reversed the decision of the panel and held that the defendant was presumptively denied effective assistance by his sleeping counsel. *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001).

On November 1, 2006, the Sixth Circuit Court of Appeals, split 6-6, and let stand a District Court ruling that defense counsel’s failure to appreciate that the man he represented, who was convicted and sentenced to death, was not the man named in the indictment, was not sufficiently prejudicial to warrant a new trial despite findings that awareness of that fact could have generated significant evidence in mitigation of punishment. *Slaughter v. Parker, Warden*, Sixth Circuit Nos. 01-6359/6462.

We have observed the power of a free press to reveal wrongdoings or policy choices of those in power. Ominously, we have also been witness to the consolidation of the media and its politicization.

While we have observed the decline of the print media we have seen the rise of the internet and its seemingly unlimited resources, some of questionable reliability. We have also witnessed the power

of the internet in domestic politics and as a way to communicate globally and instantaneously at no expense.

In the past 40 years we have watched the growth and maturation of the Virginia Trial Lawyers Association, from the early days as a collection of plaintiff's personal injury lawyers to a broader based census of litigators, from a group politically impotent to a policy shaper in the General Assembly, and as an educator using listserves, online legal research, knowledge depositories such as Trial-Smith, print publications of first class quality, leading CLEs, successful conventions and a team of legislative representatives who know the territory.

Our clients have suffered the indignities of caps on recovery, and have done so for no apparent reason at all. The 1976 cap on all damages in medical malpractice had no legislative fact finding to support it. The 1987 cap on punitive damages had no legislative fact finding to support it, but was a last minute compromise between those who wanted no cap and those who wanted a cap on non-economic damages. The result was a cap on punitive damages when there was no punitive damages problem in Virginia.

The medical malpractice cap singles out for the most severe treatment the most seriously injured and the ones, like children, with the longest care needs. The higher the dollar cost of care, the more dollars were ceded by the damaged patient not to the doctors who sought refuge in the cap, but to their insurers who could now insure the doctor or hospital for 100 percent of the risk. Doctors so insured have little incentive to settle, and there was no credible evidence the cap brought Virginia health care providers any lower premiums. Truth once again succumbed to public relations and politics.

Nor did the punitive damages cap make any sense. The same ceiling applied to the neighborhood drycleaner and General Motors. In 20 years, the cap has remained the same – \$350,000.

Attitudes towards lawyers took a beating in the period. Tasteless advertising and skillful public relations manipulation by those we sue were so successful that two of the major trial lawyers organizations fled from the ignominy of their names. The Association of Trial Lawyers of America became the American Association for Justice, and Trial Lawyers for Public Justice truncated to Public Justice. "Trial Lawyer" had become a dirty word. I considered whether the International Academy of Trial Lawyers should become the International Academy of [Redacted].

Another disturbing trend commenced in the period. Law schools began teaching the econometrics of legal policy. How does the tort system impact our national economy? I have no complaint with academic inquiry into that area per se, but when it is used to justify legislation shifting the burden of

loss from, let's say, a trucking company to the quadriplegic injured by its driver's negligence, it needs to find another academic home outside our law schools. I would hate to see our law schools stop teaching us, *inter alia*, how to protect individuals from abusive power, public or private, and teach us instead how they might be co-opted by that power.

There are some lessons we have learned in these 40 years about the econometric model in health care costs. No matter what the 50 states, the District of Columbia and the federal government do to "reform" malpractice law, the cost to the health care system of medical malpractice premiums remains at less than 1 percent, and has for the past 40 years. Despite this fact, our opponents insist that health care costs are spiraling out of control, driven by doctors who practice defensive medicine.

We have watched our nation struggle to accommodate a President's right to nominate whomever he pleases to the federal bench, and the Senate's right to withhold its consent to those nominations.

We have recently witnessed revival of an old truth - that the rule of law is bigger and than the rules of law, which can change with appointments to the bench. A 5-4 "yes" and 5-4 "no" may well implicate the rules of law, but not the rule of law. When the court elected George W. Bush president by 5-4, despite long standing precedents that a state has the exclusive power to determine its electoral processes, the nation didn't collapse into revolution. It honored the rule of law even if the rule in question was wrongly decided.

We have watched the religious right attempt to exercise its dominion over the political process, and have its moral values guide our judicial process. God's so-called "decree" that the races not mix [*Loving, supra*] has morphed into a decree that persons of the same sex not marry. Of two distinct biblical abominations, homosexuality and eating shell fish,<sup>2</sup> only the former has attracted political voice.

Unconstrained by the law, religious purity by modern zealots would dictate that once a woman becomes pregnant she loses legal control over her body. Even though pregnant through rape or incest, or threatened with the loss of her own life or health in the birthing process, she would be powerless to change the course of events. The law, mercifully, takes a contrary view.

Religious fervor for human life, left unrestrained by the law, would produce the following anomaly: once declared "a living human being," an aggregation of eight human cells would enjoy absolute protection against extinction while its billion cell counterpart, a fully grown human, might be executed for cause, if a citizen, or no cause at all if an alien.

The eight cell amalgam has acquired such stature that not a single cell of it may be used for federally funded stem cell research despite the promise of cure for life altering conditions.

I'm unable to draw this survey to a close without commenting on the positions taken by the current President and frequently imposed by his administration without consultation with the Congress or oversight by the courts. They ring of an era past.

He contends that America, the greatest nation on the face of the earth, has the right to hold another human in custody indefinitely and perhaps put him to death without a trial, without the customary procedural safeguards, and without access to the courts. He has sought and the last Congress has authorized \$30 million to be spent to build a prison for some "enemy combatants" in order to house them for up to the balance of their natural lives because insufficient evidence to charge them has yet been developed – after four years.

We have heard the President argue it is constitutionally permissible to wiretap American citizens without judicial approval, and his administration has done so.

We have witnessed the implementation [and abuse] of National Security Letters, which require the production of records without judicial intervention or oversight and under a mandate that the recipient not disclose that he has received a National Security Letter.

We have read a memorandum from the most recent Attorney General of the United States, writing then as Counsel to the President, that obedience to some of the terms of the Geneva Conventions is no longer required because those terms have become rendered "quaint" and inapplicable to our current conflicts.

We have regressed.

When I entered the practice of law in 1966, the nation was in the 7th year of an un-winnable war. People who opposed the war were called traitors. "It's my country. Love it or leave it." Racial discrimination was rampant. The jury lists were rigged. My clients had no chance of getting a jury of their peers. The legislative process was for "whites only" and the judges were all white males. The community was insensitive to human differences, tolerated uncontrolled political power, overlooked a lack of accountability, and shared a disregard for fundamental fairness.

Much, since then, has changed for the better.

Today we are in the 5th year of an un-winnable war under a President who doesn't want to leave until we win, but who is yet to define what it means to "win." How will we know if and when we have won? People opposed to the war aren't traitors. They're just wimps who want to "cut and run." Immigration policy is discrimination's new vessel, showing up in proposals to arrest, try, convict and deport 12 million "illegals," or to build a 700-mile tall fence to keep "them" out, or both.

How vaguely familiar it all sounds. We are a work in progress, aren't we?

#### **Endnotes**

1. *Loving v. Commonwealth*, 206 Va. 924 (1966).
2. Leviticus 11:10-12

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